A

ABC & Anor v JKL

B HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22F-3–11 OF 2019
HAYATUL AKMAL J
5 MARCH 2020

C *Civil Procedure — Injunction — Interim injunction — Application for interim injunction pending final disposal of writ — Whether interim injunction ought to be allowed*

D *Family Law — Children — Adoption — Adoption of illegitimate child — Whether defendant had rights over the child — Adoption Act 1952 s 9(1)*

The plaintiffs had applied for interim orders under Part 3 of the Specific Relief Act 1950, ss 15 and 24(d) of the Courts of Judicature Act 1964, for an E interlocutory injunction under O 29 r 1 and r 2 and O 92 r 4 of the Rules of Court 2012. The plaintiffs were married in 2008 but unfortunately were unable to conceive throughout the years, despite undergoing two in vitro fertilisation procedure. They opted to adopt and had successfully registered themselves as prospective adoptive parents after going through all required F vetting process at OrphanCare, a non-government organisation. In 2016, OrphanCare informed them that a baby boy ('GHI') was available for adoption. They were told that the said child was born out wedlock by a mother ('RML') and the whereabouts of GHI's father was unknown. RML affirmed a statutory declaration agreeing to the adoption and that she did not know the G whereabouts of GHI's father. An adoption order was applied and secured on 12 July 2016 from the sessions court, Shah Alam, Selangor. However, sometime in October 2016, the plaintiff's tranquil existence with their new adopted infant son, allegedly became chaotic with the sudden appearance of the defendant in their life. Consequently, on 11 November 2019, the plaintiffs H filed a claim for mandatory injunction against the defendant to compel the defendant to remove or delete all statements, images or posting regarding the plaintiffs and/or their adopted infant child from any social media platforms pending the disposal of this suit.

I **Held**, allowing the plaintiff's application with no order as to cost:

(1) The granting of the interim injunction herein was validly needed in order to protect GHI who was lawfully adopted by the plaintiffs under the Adoption Act 1952 ('the Act'). The court adoption order had never been rescinded or revoked. Though the defendant had applied to intervene in

the adoption proceedings then but had withdrawn his action. Section 9(1) of the Act was clear in that the rights of the parents/guardians had been extinguished by the making of an adoption order under the Act (see paras 22–23).

(2) The defendant had not till to date adduced any independent verification that he was the biological father of the said illegitimate child except for his bare claims and averments. There was no express and/or direct evidence by any party including the biological mother of the said illegitimate child that the defendant was in fact the father. That said and notwithstanding, the law as it stood did not support the position and claim of the defendant. A child who was born out of wedlock was related only to his/her mother and had no relationship with the biological father (see para 24).

(3) There were materials that clearly supported the granting of the interim injunction to protect the child from direct and/or indirect third party interference (putative father) who had no right to do so as dictated by law. The defendant would not be prejudiced by the granting of this interim injunction pending the final determination of this suit by the plaintiffs. If this interim injunction was not granted there was a real and significant risk to the safety of the life of said child and his adoptive parents from third party interference by the putative father in total disregard to the court adoption order granted by a court of competent jurisdiction to the plaintiffs. The defendant had not been able to show any damage (real or otherwise) that would be suffered by him by the granting of this order (see paras 25–26).

[Bahasa Malaysia summary

Plaintif telah memohon perintah interim di bawah Bahagian 3 Akta Relif Spesifik 1950, ss 15 dan 24(d) Akta Mahkamah Kehakiman 1964, untuk perintah injunksi interlokutori di bawah A 29 k 1 dan k 2 dan A 92 k 4 Kaedah-Kaedah Mahkamah 2012. Plaintif telah berkahwin pada tahun 2008 tetapi malangnya tidak dapat hamil tahun demi tahun, walaupun telah menjalani dua prosedur persenyawaan in vitro. Mereka memilih untuk mengambil anak angkat dan berjaya mendaftarkan diri sebagai calon ibu bapa angkat setelah melalui semua proses pemeriksaan yang diperlukan di OrphanCare, sebuah organisasi bukan kerajaan. Pada tahun 2016, OrphanCare memberitahu mereka bahawa bayi lelaki ('GHI') telah tersedia untuk pengangkatan. Mereka diberitahu bahawa anak tersebut dilahirkan luar nikah oleh seorang ibu ('RML') dan keberadaan ayah GHI tidak diketahui. RML mengesahkan satu pernyataan berkanun yang bersetuju dengan pengangkatan tersebut dan bahawa dia tidak tahu keberadaan ayah GHI. Perintah pengangkatan dipohon dan didapatkan pada 12 Julai 2016 dari mahkamah sesyen, Shah Alam, Selangor. Namun, pada bulan Oktober 2016, kewujudan plaintif dengan anak lelaki angkat mereka yang baru, didakwa

menjadi huru-hara dengan kemunculan defendan dalam hidup mereka secara tiba-tiba. Akibatnya, pada 11 November 2019, plaintif memfailkan tuntutan untuk perintah injunksi mandatori terhadap defendan untuk memaksa defendan untuk membuang atau menghapus semua pernyataan, gambar atau catatan mengenai plaintiff dan/atau anak angkat mereka dari mana-mana platform media sosial sementara menunggu penyelesaian guaman ini.

Diputuskan, membenarkan permohonan plaintif tanpa perintah kos:

(1) Pemberian perintah injunksi interim ini secara sah diperlukan untuk melindungi GHI yang diambil sebagai anak angkat secara sah oleh plaintif di bawah Akta Pengangkatan 1952 ('Akta'). Perintah pengangkatan mahkamah tidak pernah dibatalkan atau dimansuhkan. Walaupun defendan telah memohon untuk campur tangan dalam proses pengangkatan ketika itu tetapi telah menarik balik tindakannya. Seksyen 9(1) Akta jelas dalam hal hak-hak ibubapa/penjaga telah dihapuskan dengan membuat perintah pengangkatan di bawah Akta (lihat perenggan 22–23).

(2) Sampai sekarang, defendan belum membuat pengesahan bahawa dia adalah bapa kandung anak luar nikah itu kecuali tuntutan dan penolakannya semata-mata. Tidak ada bukti nyata dan/atau langsung oleh mana-mana pihak termasuk ibu kandung anak luar nikah tersebut bahawa defendan sebenarnya adalah bapa. Walau demikian, undang-undang yang ada tidak mendukung kedudukan dan tuntutan defendan. Seorang anak yang dilahirkan luar nikah hanya berkaitan dengan ibunya dan tidak mempunyai hubungan dengan bapa kandungnya (lihat perenggan 24).

(3) Terdapat material yang secara jelas menyokong pemberian perintah injunksi interim untuk melindungi anak dari gangguan pihak ketiga secara langsung dan/atau tidak langsung (bapa putatif) yang tidak memiliki hak untuk melakukannya sebagaimana yang ditentukan oleh undang-undang. Defendan tidak akan diprejudis dengan pemberian perintah injunksi interim ini sementara menunggu keputusan akhir tuntutan ini oleh plaintif. Sekiranya perintah injunksi interim ini tidak diberikan, ada risiko nyata dan signifikan terhadap keselamatan nyawa anak tersebut dan ibu bapa angkatnya daripada campur tangan pihak ketiga oleh bapa yang dianggap tidak menghiraukan perintah pengangkatan mahkamah yang diberikan oleh mahkamah yang berkuasa kepada plaintif. Defendan tidak dapat menunjukkan kerugian (nyata atau sebaliknya) yang akan ditanggung olehnya dengan pemberian perintah ini (lihat perenggan 25–26).]

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (refd)
American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504; [1975] AC 396, HL (refd)
Carroll (an infant), Re [1931] 1 KB 317, CA (refd)
Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor [2008] 4 MLJ 470; [2012] 1 LNS 896, CA (refd)
Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492, HC (refd)
Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor [2013] 3 MLJ 534; [2013] 2 AMR 678; [2013] MLRHU 970, HC (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (refd)
Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors [1999] 5 MLJ 688; [1999] 4 CLJ 753, HC (refd)
Masam v Salina Saropa & Anor [1974] 2 MLJ 59 (refd)
Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor [2016] 4 MLJ 282; [2016] 4 AMR 256; [2016] CLJ 346, FC (refd)
Norlela bte Mohamad Habibullah v Yusuf Maldoner [2004] 2 MLJ 629, HC (refd)
R v Ireland, R v Burstow [1998] AC 147, HL (refd)
McGrath (infants), Re [1893] 1 Ch 143, CA (refd)
Miskin Rowter, Re [1963] 1 MLJ 341 (refd)
O'Hara, Re [1900] 2 IR 232 (refd)
TSY (an infant), Re [1988] 3 MLJ 43, HC (refd)
Sean O' Casey Patterson v Chan Hoong Poh & Ors [2011] 4 MLJ 137; [2011] 3 CLJ 722, FC (refd)
Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150, FC (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533, FC (refd)
Tan Chong Pay v Tan Swee Boon [1997] MLJU 50; [1997] 4 CLJ 625, HC (refd)
Tang Kong Meng v Zainon bte Md Zain & Anor [1995] 3 MLJ 408; [1995] 4 CLJ 409, HC (refd)
Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234, FC (refd)
Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter [1992] 2 MLJ 689, SC (refd)
Toh See Wei v Teddric Jon Mohr & Anor [2017] 11 MLJ 67, HC (refd)
Tracerco Asia Sdn Bhd v Nor Hisham Mohd Nordin & Ors [2013] 7 MLJ 75, HC (refd)
Yong May Inn v Sia Kuan Seng [1971] MLJ 280; [1970] 1 LNS 176 (refd)

Legislation referred to

Adoption Act 1952 s 9, 9(1)
Courts of Judicature Act 1964 ss 15, 24(d), Schedule
Legitimacy Act 1961 s 3, 3(1)
Registration of Adoptions Act 1952 s 6
Rules of Court 2012 O 29 rr 1, 2, O 92 r 4
Specific Relief Act 1950 s 50, Part 3, Chapter IX

Honey Tan Lay Ean (Tay Kit Hoo with her) (Tan Law Practice) for the plaintiffs.
Choo Dee Wei (Nur Shainaz bt Azizor Rahman with him) (Dee, Netto, Fatimah & Ng) for the defendant.

Hayatul Akmal J:

INTRODUCTION

[1] The plaintiffs in this case had applied for interim orders under Part 3 of the Specific Relief Act 1950, ss 15 and 24(d) Courts of Judicature Act 1964, for an interlocutory injunction under O 29 rr 1 and 2 and O 92 r 4 of the Rules of Court 2012 ('the RC 2012') ((encls 4 and 13 (amended), respectively) supported by an affidavit (encl 5). Briefly the plaintiffs are asking for orders pending the final disposal of the writ filed, as follows:

1. that the Defendant shall be restrained from being anywhere within five hundred (500) meters of the Plaintiffs' place of residence and/or their child, GHI (the Child)'s school; and
2. that the Defendant shall be restrained from being anywhere within one hundred (100) meters of the Plaintiffs and/or the Child save and except during his court attendances of these proceedings; and
3. that the Defendant shall be restrained from assaulting, harassing and/or stalking the Plaintiffs and/or the Child; and
4. that the Defendant shall be restrained, whether by himself or by his servants, agents, representatives, and/or nominees from contacting or attempting to contact the Plaintiffs and/or the Child by any means save and except through the Plaintiffs' solicitors; and
5. that the Defendant shall be restrained from doing, procuring, inciting, abetting or encouraging any other person to contact or attempt to contact the Plaintiffs by any means in respect of any claim regarding the Child save and except through the Plaintiffs' solicitors; and
6. that the Defendant shall be restrained from publishing any statements, images and/or altered images regarding the Plaintiffs and/or the Child as postings on the Internet or any other platform accessible to the public or otherwise howsoever; and

7. that the names, addresses, details and any evidence whether oral or documentary relating to these proceedings likely to lead to the identification of parties, the Child and the witnesses herein shall not be published or cause to be published by any person save and except by initials, and in particular that the names of the parties shall be referred to as follows:

   7.1 the 1st Plaintiff as 'ABC';

   7.2 the 2nd Plaintiff as 'DEF';

   7.3 the Plaintiffs' Child as 'GHI'; and

   7.4 the Defendant as 'JKL';

   (the Order to Anonymise)

8. that all such identities in the Writ, pleadings and cause papers filed to date in this Honourable Court shall be redacted and substituted by initials, and affidavits re-affirmed and filed in accordance with the Order to Anonymise prior to service on the Defendant and/or his solicitors; and

9. that the Plaintiffs shall be exempted from the requirement to state their place of residence under Order 41 Rule 1(4) and Order 92(4) Rules of Court 2012 in all pleadings, affidavits and other cause papers filed by the Plaintiffs in these proceedings, and that the same be replaced in the care of the address of their solicitors; and

10. that the Defendant, whether by himself or by his servants, agents, representatives and/or nominees shall be restrained from posting, publishing or sharing the pleadings and all other cause papers in these proceedings on the Internet or otherwise; and

11. that parties be at liberty to apply; and

12. that the costs of this application shall be costs in the cause; and

13. any further reliefs and/or other orders deemed fit and proper by this Honourable Court.

[2] The cause papers and written submissions are as follows:

(a) encl (4): notice of application dated 12 November 2019;

(b) encls (5) and (6): plaintiffs' affidavit in support affirmed by ABC dated 11 November 2019;

(c) encl (7): plaintiffs' affidavit in support affirmed by DEF dated 11 November 2019;

(d) encl (19): defendant's affidavit in reply affirmed by JKL dated 29 November 2019;

(e) encl (21): ad-interim order dated 29 November 2019;

(f) encl (24): plaintiffs' affidavit in reply affirmed by ABC dated 13 December 2019;

(g) encl (31): defendant's affidavit in reply (2) affirmed by JKL dated 19 December 2019;

(h) encl (32): plaintiffs' affidavit in reply (2) affirmed by ABC dated 3 January 2020; and

(i) encl (33): plaintiffs' affidavit in reply (2) affirmed by DEF dated 3 January 2020.

Submissions by the plaintiffs (encl 28) and submission by the defendant (encl 26) and oral submissions in reply by the learned counsels.

[3] On 9 January 2020, after perusing the cause papers and hearing the submissions of counsels, I allowed the plaintiffs' application ((encls 4 and 13 (amended)), with no order as to cost. Dissatisfied, JKL had filed this appeal and my reasons are as follows:

BRIEF FACTS

[4] The brief facts disclosed from the cause papers are as follows:

(a) the plaintiffs (ABC and DEF) were married at Pejabat Pendaftaran Kuala Lumpur on 10 October 2008 ((exh TTK-INJ-1) — (encl 5)) but unfortunately were unable to conceive throughout the years, despite undergoing two in vitro fertilisation (IVF) procedure on 14 May 2014 and 7 August 2014, respectively ((exh TTK-INJ-3) — (encl 5));

(b) not wanting to go through the emotional toll caused by the failure of the medical procedure to assist in conceiving a child, they opted to adopt and had successfully registered themselves as prospective adoptive parents after going through all required vetting process at OrphanCare, a non-government organisation ('NGO'). Due to the long waiting list, they had to patiently wait;

(c) a few days before the celebration of the Chinese New Year in 2016, OrphanCare informed them that a baby boy ('referred as GHI') is available for adoption. They were told that the said child was born out of wedlock by a mother who is a Malaysian Christian ('later referred as 'RML'). The whereabouts of GHI's father was unknown;

(d) on 12 January 2016, the plaintiffs meet RML and her parents who informed them that RML has two other older children and due to financial constraint, they can't afford to care for GHI. They had asked the plaintiffs to pay for RML's medical expenses of RM14,539.25 which the plaintiffs obliged, and the plaintiffs had also donated RM2,500 to OrphanCare ((collectively exh TTK-INJ-4) — (encl 5));

(e) RML affirmed a statutory declaration agreeing to the adoption and that she did not know the whereabouts of GHI's father ((exh TTK-INJ-5) — (encl 5)). That was the last time the plaintiffs met her; and

(f) an adoption order was applied and secured on 12 July 2016 from the Sessions Court, Shah Alam, Selangor (No BA-58–33–02 of 2016). This was followed with the registration of the said adoption at the National Registration Department of Malaysia ('the NRD') resulting in GHI's birth certificate being issued by the NRD ((exh TTK-INJ-9) — (encl 5)).

[5] However, sometime in October 2016, the plaintiff's tranquil existence with their new adopted infant son, allegedly became chaotic with the sudden appearance of the defendant in their life. They claimed that:

(a) the defendant had committed wrongful and intolerable behaviour on and off social media against them in the adoption of the said child;

(b) the defendant's behaviour had allegedly caused the plaintiffs serious alarm, fear and distress as he may abduct the child at any time;

(c) the defendant had apparently admitted publicly to third parties that if he finds the child, he will abduct the child and leave the country;

(d) the plaintiffs live in genuine fear that the defendant may carry out his threats as he had shown no regard or fear for the authorities;

(e) the defendant has shown himself to be an unstable and erratic person;

(f) the defendant claimed that he is the biological father of the said infant child but had apparently withdrawn his application to intervene in the court adoption proceedings with liberty to file afresh. Therefore, there is no conclusive proof that the defendant is the biological father of the child;

(g) the defendant admits to actively publishing about the plaintiffs and the said infant child on social media to garner public support in claiming for the said child;

(h) the defendant admits to harassing the plaintiff about the said child;

(i) the defendant admits to posting the picture of the plaintiffs on his social media account; and

(j) the defendant admits to contacting the plaintiff's family, friends, work colleagues and strangers claiming to be the father of the said child in order to procure further information about the child.

[6] Consequently, on 11 November 2019, the plaintiffs filed a claim for mandatory injunction against the defendant to compel the defendant to

remove or delete all statements, images or posting regarding the plaintiffs and/or their adopted infant child from any social media platforms pending the disposal of this suit. In the circumstances, an interim injunction against the defendant applied for by the plaintiffs was granted by this court on 9 January 2020. The defendant is now appealing against this interim order for injunction and my grounds are as follows.

THE PLAINTIFFS' CASE

[7] *Serious issues to be tried/threat of abduction and physical harm*:

(a) the plaintiffs adopted a child by virtue of a sessions court order dated 12 July 2016;

(b) sometime in October 2016, the defendant, who merely makes a bare claim that he is the putative father of the child, has embarked on a defamatory campaign of fear and harassment against the plaintiffs instead of taking action to challenge the said court adoption order secured from the Shah Alam Sessions Court;

(c) the defendant has defamed the plaintiffs, put them in fear of the child being abducted, subjected the plaintiffs to public humiliation and contempt, and caused tremendous emotional distress. The defendant multiple times across various social media platforms since 2016 has publicly accused the plaintiffs amongst other things, of 'buying' the child, as being 'human traffickers', 'child abusers' and committing 'genocide' by adopting the said child. The plaintiffs genuinely fear that the child may be abducted even in their presence;

(d) simple daily routines and family activities such as eating out, holidays and trips to the mall are incredibly stressful for the plaintiffs who fear that the defendant may be watching them;

(e) the second plaintiff does not go anywhere alone with the child without being accompanied by another adult out of fear for the safety of herself and the said child; and

(f) the plaintiffs no longer allow the said child to be photographed by anyone in fear that the defendant may get his hands-on recent pictures of the said child and attempt to go through with his threats to abduct the said child.

[8] *The defendant admitted to committing other torts*:

From his affidavit in reply dated 29 November 2019, he had admitted to the following (amongst others):

(a) My act in actively publishing on social mediums are my efforts in searching for GHI (para 23.2).

(b) I believe that any parent would react and act in the same way as I have due to concern as to the whereabouts and the welfare of GHI' (para 23.3).

(c) I only attempted to contact the individuals in paragraph 24 above in April 2007 when I did a manual file search at the Shah Alam Court Complex' (para 25).

The defendant through his actions continues to cause the plaintiffs severe emotional distress.

[9] *Balance of convenience and damages as an adequate remedy*:

(a) the defendant will not be prejudiced by the court's discretion to grant the interim injunction;

(b) the welfare and best interest of the child should be a paramount consideration in exercising the discretion to grant the interim injunction;

(c) the plaintiffs are a loving couple that have provided the child with a loving, stable and safe environment;

(d) the child has been in the care of the plaintiffs since he was about ten days old;

(e) the plaintiffs' as guardians of the child have decided that it would be in the welfare and best interest to inform the child about his adoption at an appropriate time, and not at this current juncture;

(f) there is no evidence that the defendant is indeed the father of the child; and

(g) the defendant has exhibited unstable, erratic, highly emotional and abnormal behaviour that significantly puts the safety and wellbeing of the child at risk.

[10] The plaintiffs have fully complied with Malaysian law and the said court adoption order granted is a final and perfected order. Save and except in circumstances that it is set aside or revoked, the effect of the order is final. There is no evidence that the defendant is the father of the child and in the alternative that the defendant is proven to be the father of the child, any rights of the defendant (if any, as the putative father of a child born out of wedlock) has been extinguished as per s 9(1) of the Adoption Act 1952.

[11] It was argued that if the interim injunction is not granted by this honourable court, there is a real and significant risk to the safety of the plaintiffs and their child as the defendant is aware of their identities and residential address. If the interim injunction is not granted, the effect and impact on the

plaintiffs and the child will be irreparable. Damages would be an adequate remedy to compensate the defendant if it is determined later that the interim injunction had been wrongly granted.

THE DEFENDANT'S DEFENSE

[12] The defendant argued in a nutshell as follows:

(a) that the alleged tort of stalking, emotional distress and invasion of privacy are not actionable torts. I was alluded to the case of *Toh See Wei v Teddric Jon Mohr & Anor* [2017] 11 MLJ 67:

> [58] The tort of invasion of privacy is not recognised tort under common law ... In *Malaysia, Ultra Dimension Sdn Bhd v Kook Vei Kuan* [2001] MLJU 751; [2004] 5 CLJ 285 held that there is no right to institute an action for invasion of privacy rights ...
>
> [59] It is also recognised by this court that all the cases recognised the tort of invasion of privacy is limited to matter of private morality and modesty in particular women ...

(b) the tort of assault: defendant argued that the plaintiffs by their own evidence, knew about the existence of the defendant as early as October 2016, but since then till to date no such incident of assault had taken place. Attention was drawn to *R v Ireland, R v Burstow* [1998] AC 147, which laid down the principle that words can constitute an assault where it instils a reasonable fear of unlawful and immediate physical violence. If the defendant had the intention to kidnap and/or abduct GHI, he would not have gone through the legal process (no evidence produced to support this contention) to obtain access to GHI, as his biological father. Further, he would not have waited for more than two years to do so. There is no proof whatsoever that the defendant can carry out any purported threats;

(c) the tort of harassment was only recently introduced into our legal system by the Federal Court's decision in *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282; [2016] 4 AMR 256; [2016] CLJ 346 it was held that:

> After mulling over the matter, we arrived at a decision to undertake some judicial activism exercise and decide that it is timely to import the tort of harassment into our legal and judicial system, with sexual harassment being part of it.
>
> It was argued that the defendant was merely trying to establish contact with the plaintiffs in his sole effort to be united with his child GHI, whom he claimed was snatched from him and given up for adoption (no evidence produced to support this contention) without his prior

knowledge. Thus, the plaintiffs' allegations are merely an afterthought in wanting to sever all biological ties between the defendant and GHI, without any consideration of the interest of GHI;

(d) the tort of defamation (libel): I was alluded to *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492 and *Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor* [2013] 3 MLJ 534; [2013] 2 AMR 678; [2013] MLRHU 970, it was held:

> ... the right to preservation of one's reputation is acknowledged as right in rem, a right good against the whole world.

The defendant argued that a letter demanding an apology and compensation should have been served on him before instituting an action against him if the true intentions and desire of the plaintiffs are merely to preserve their reputation in the public eye. Bringing a legal action for the purpose of preserving the reputation of the plaintiffs should only be the last resort in the event the defendant still refuses to apologise and/or retract his alleged defamatory statements and/or postings despite formal demands. It is trite that to succeed in a defamation action, there essential elements must be established. The elements are that the statements are defamatory; it refers to the plaintiffs; and there was publication. The plaintiffs have failed to plead the impugned words which are allegedly defamatory. They merely collated postings by the defendant;

(e) RML's (biological mother) purported admissions: based on the police reports made by RML and the messages sent by RML which was enclosed as exhibits in the first plaintiff's supporting affidavit, RML herself had apparently admitted that the defendant is the biological father of the child, GHI ((refer exhs ABC-INJ-12, ABC-INJ-14 and ABC-INJ-20) — (encl 14)).

(f) draconian terms of the injunction order: the defendant claimed that the terms of the order which are ambiguous would severely restrict the movements and activities of the defendant. My attention was drawn to *Tracerco Asia Sdn Bhd v Nor Hisham Mohd Nordin & Ors* [2013] 7 MLJ 75 that held:

> ... the terms contained therein are unjust and inequitable as it has been deliberately drafted in wide and ambiguous terms whereby the plaintiff is seeking to restrain the defendants from lawful trade.

In his argument that the order is draconian in nature due to ambiguity, the defendant conjectured a situation where the defendant could have unintentionally encroached into the space of which there is a restraining order on him and unfortunately there is no mention of

what the defendant should do thereafter, ie whether he is to leave immediately or whether the encroachment will be disregarded. Paragraph 3 of the restraining order is also vague as there is no guidance on what is to be considered acts of assaulting, harassing, and/or stalking the plaintiffs and/or the child. The defendant is merely exercising his rights in his search for GHI and thereafter fighting to gain access. I was referred to *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 where it was held only in very rare circumstances and in the most extreme circumstances that this court should interfere by way of mandatory injunction and this case should not be considered as one of those rare circumstances; and

(g) principles in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504; [1975] AC 396 and adopted in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293 has not been satisfied as there are no serious issues to be tried to warrant or justifying the granting of an interim injunction. The plaintiffs' have failed to provide any proper undertaking as their undertaking. They have not supported their undertaking with any proof to show that they are financially able to compensate the defendant in the event the said order is dismissed. Thus, the restraining order if allowed to continue would further prevent a broken-hearted father who has been pinning for his only child for almost four years from any possible contact with GHI. The plaintiffs have failed to satisfy all the necessary requirements in order to obtain the restraining order against the defendant. The plaintiffs have failed to make full and frank disclosure of all materials facts as most of their allegations are not substantiated with evidence as required in *Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors* [1999] 5 MLJ 688; [1999] 4 CLJ 753.

[13] The defendant further argued that the rights of biological father as ruled by the Federal Court in *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137; [2011] 3 CLJ 722 are not extinguished despite the registration of the adoption of the child under the Registration of Adoptions Act 1952 (Act 253) and further held that the legal rights of the natural parent or parents remain as conferred by law. This is based on the rational that an adoption under the said Act confers upon the adopted parents only custody, care, maintenance and educational right for the child. Premised on all the above, the defendant prayed that this application be dismissed.

THE LAW

[14] Injunction is an equitable remedy which is usually preventive in nature, often utilised to restrain a person from doing a wrongful act. However, it can also be an order to compel a party to perform an act. Jurisdiction to grant

injunction is under O 92 r 4 and O 29 r 1 of the RC 2012, para 6 of the Schedule to the Courts of Judicature Act 1964 and Chapter IX of the Specific Relief Act 1950. Section 50 of the Specific Relief Act 1950 stipulate that the granting of preventive relief is at the discretion of the court. It may be in the form of temporary or perpetual injunction. It is trite that the following considerations must be weighed on the balance of convenience before an interlocutory injunction can be granted:

(a) that there are serious issues to be tried;

(b) that the balance of convenience lies on the side of granting the injunction. In this respect the court must consider the harm that the injunction would produce by its grant and the harm that would result from its refusal thereof;

(c) that damages are not an adequate remedy;

(d) the sufficiency of the undertaking of damages given by applicant; and

(e) the sufficiency of the undertaking of the defendant to compensate the plaintiff in the event of judgment in the plaintiff's favor.

(See *American Cyanamid Co V Ethicon Ltd* [1975] 1 All ER 504; *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293; *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241; *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533.)

[15] The above principles were duly considered in *Keet Gerald Francis Noel John*, where Gopal Sri Ram JCA summarised what a judge hearing an application for interlocutory injunction should inquire, as follows:

A judge hearing an application for an interlocutory injunction should:

(i) Ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defiance to it and identify with precision the issue raised and decide whether they are serious enough to merit a trial. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious questions to be tried, he should move on the next step of his inquiry; and

(ii) Having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must consider all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal; and

(iii) The judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to

maintain the status quo. It is a judicial discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

[16] The Supreme Court in *Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter* [1992] 2 MLJ 689, ruled that: in an application for an interim injunction, the court is not called upon to make any final decision on any question of fact. What is required at that stage is for the learned judge to decide on the affidavits available before him that the claim in the originating summons is not frivolous or vexatious, in other words there is a serious question to be tried, and having so decided he must go on to consider the question of balance of convenience.

[17] Section 3 of the Legitimacy Act 1961 (Act 60) provides, as follows:

> 3 Conditions of application of Act
>
> (1) Nothing in this Act shall operate to legitimate a person unless the marriage leading to the legitimation was solemnised and registered in accordance with —
>
> (a) the Civil Marriage Ordinance 1952* [Ord No 44 of 1952], or the Christian Marriage Ordinance 1956* [Ord No 33 of 1956].
>
> (b) the Christian Marriage Ordinance* [Cap 24] or the Marriage Ordinance 1959* [Ord No 14 of 1959], of Sabah; or
>
> (c) the Church and Civil Marriage Ordinance of Sarawak* [Cap 92],
>
> or any Enactment or Ordinance repealed by any of the said Ordinances.
>
> (2) (Deleted by Act 164)
>
> (3) The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in property save as hereinafter in this Act expressly provided.

Section 3(1) of the Legitimacy Act 1961 provides that an illegitimate child may become legitimate if the biological father marries the mother of the child and legitimizes the child by subsequent marriage. A child who is born out of wedlock is related only to his/her mother and has no relationship with its biological father. In *Tang Kong Meng v Zainon bte Md Zain & Anor* [1995] 3 MLJ 408; [1995] 4 CLJ 409, the issue arose whether the consent of the natural father could be dispensed with in an adoption proceeding. James Foong J held that since the said child is an illegitimate child, the natural mother (who had the legal obligation to maintain the said child), had exclusive care and custody of the said child and could give valid consent to her adoption unless she had abandoned her rights beforehand. In *Re Miskin Rowter* [1963] 1 MLJ 341, Tan Ah Tah J ruled that when considering the interest of an illegitimate child, the court must have regard primarily to the welfare of the infant; the paramount consideration must be the welfare of the infant and the wishes of the natural mother.

[18] Section 9 of the Adoption Act 1952 (Act 257) provides, as follows: A

> 9 Effect of adoption order
>
> (1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock: B
>
> Provided that, in any case where two spouses are the adopters, such spouses shall in respect of the matters aforesaid and for the purpose of the jurisdiction of any Court to make orders as to the custody and maintenance of and right of access to children stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother, respectively ... C D

Section 9(1) of the Adoption Act provides that upon an adoption order being made, the rights and obligations of the parents or guardians of the adopted child are extinguished. Edger Joseph J in *Re TSY (an infant)* [1988] 3 MLJ 43, stated that the general effect of an adoption order is that it destroys the legal bond between the infant and its natural parents and puts him in precisely the same position as a natural child of the adoptive parents. E

[19] Section 6 of the Registration of Adoptions Act 1952 (Act 253) provides, as follows: F

> 6 Registration of de facto adoptions
>
> (1) Where at the date when application for registration is made any child under the age of eighteen years who has never been married is in the custody of, and is being brought up, maintained and educated by any person, or by two spouses jointly, as his, her or their own child under any de facto adoption, and has for a period of not less than two years continuously and immediately before the date of such application been in such custody and has been so brought up, maintained and educated, the Registrar may, upon the application, in the form in the First Schedule, of such person or spouses, register the adoption if — G
>
> (a) such person or spouses and the child shall appear before the Registrar and shall produce to the Registrar such evidence either oral or documentary as may satisfy the Registrar that such adoption took place. H
>
> (b) the parents or one of the parents, or, if both the parents are dead or if neither of the parents is within Peninsular Malaysia, any guardian of the child shall appear before the Registrar and express consent to the adoption: I
>
> Provided that if the Registrar is satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child he may dispense with the consent of any parent or custodian of the child or with the appearance of any parent or custodian who shall have signified his consent by statutory declaration; and

A (c) the prescribed fees are paid.

(2) The Registrar shall register an adoption by entering the particulars thereof in the register.

B **[20]** The Federal Court in *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137; [2011] 3 CLJ 722, has settled the confusion and uncertainty as to the application and the difference between adoption under Registration of Adoption Act 1952 (Act 253) to an adoption under the Adoption Act 1952 (Act 257), both legislations were passed by Parliament in the same year. The Federal Court in *Sean O' Casey Patterson* pronounced that, C under the Registration of Adoption Act 1952 (Act 253), the rights of biological parents remain and are not extinguished, notwithstanding the registration of an adoption of their child. James Foong FCJ, in delivering the decision of the Federal Court, explained, which for the purpose of convenience I have surmised as follows: D

(a) an adoption under the Registration of Adoption Act 1952 (Act 253) is generally referred to as the Registrar's Adoption made by the Registrar of Adoption. Act 253 caters to de facto (as a matter of fact) adoptions;

E (b) adoption under the Adoption Act 1952 (Act 257) is generally referred to as a 'Court Adoption'. It is one that must be made through a court process and includes adoptions de jure (as a matter of law). The Adoption Act (Act 257) contains a provision which expressly extinguishes all rights, duties, obligations and liabilities of the parent or F guardian in relation to the future custody, maintenance and education of the adopted child (including all rights to appoint a guardian or to consent or give notice of dissent to marriage) and vests all such rights, duties, obligations and liabilities in the adopter as though the adopted child was a child born to the adopter in lawful wedlock;

G (c) a similar provision like the provision in Act 257 is evidently absent from Act 253. Accordingly, Act 253 only caters for a de facto adoption. As such it is of limited effect and parents who adopt under Act 253 only have custodial rights to the child. A child adopted under Act 253 will also not have a right to inherit any property of the adoptive parents H should they die intestate;

(d) the Federal Court agreed with the views expressed by the courts below that Act 253 was enacted to cater for Muslims (though its application is not restricted to Muslims only) where it is common practice for Muslims I in this country to 'adopt' children. Thus, in order to legitimise such customary practices, the adoption could be registered under Act 253 to safeguard the right to custody of the adoptive parents;

(e) the Federal Court made it clear that it did not accept the notion or argument that just because the adoptive parents under Act 253 only

have custody, care, maintenance and educational rights over the child, the adoption is invalidated by the appearance of a natural parent who demands it to be so. The Federal Court ruled that the adoption remains valid as it was properly registered after due process in accordance with the law; and

(f) therefore, since it was adoption under Act 253, the rights of the appellant as the biological father of the said child, remains based on the rationale that an adoption under Act 253 only confers custody, care, maintenance and educational rights over the child.

[21] As regards to the welfare of the child ('GHI'). In *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234 at p 239, Raja Azlan Shah FCJ stated clearly that the overriding consideration is the welfare of the child. The welfare of the child is not the paramount consideration, it is the only consideration. In *Masam v Salina Saropa & Anor* [1974] 2 MLJ 59, custody of the illegitimate boy was granted to the foster parents. The wishes of the natural parent to care for his or her children must necessarily take low priority compared to the best interests or welfare of the children. In *Yong May Inn v Sia Kuan Seng* [1971] MLJ 280; [1970] 1 LNS 176 it was said that the term 'welfare' means that every circumstance must be taken into consideration and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. In the opinion of Lindley LJ in the case of *Re McGrath (infants)* [1893] 1 Ch 143 at p 148, the expression 'welfare of the child' must be construed to a wider meaning which includes moral and religious welfare of the child and does not confine merely to money or physical comfort. The court must intervene if the harm to the child can be classified as a real and immediate danger to their physical well-being from anyone including their parents (see *Tan Chong Pay v Tan Swee Boon* [1997] MLJU 50; [1997] 4 CLJ 625).

FINDINGS OF THIS COURT

[22] It is my considered view that premised on the position of the law as set out above and the facts as presented to this court, the granting of the interim injunction herein is validly needed in order to protect this infant child ('GHI') who is lawfully adopted by the plaintiffs under the Adoption Act 1952 (Act 257). Plaintiffs are in possession of a lawful court adoption order dated 12 July 2016 from the sessions court ((exh TTK-INJ-8) — (encl 5)). An order of a court of competent jurisdiction is a valid order unless and until it is set aside. It remains legal and effective in accordance to terms that it was awarded (see *Norlela bte Mohamad Habibullah v Yusuf Maldoner* [2004] 2 MLJ 629). This said order had never be rescinded or revoked. Though the defendant had applied to intervene in the adoption proceedings then but had withdrawn his action for reason(s) best known to him.

[23] Section 9(1) of the Adoption Act (Act 257) is clear in its intent that upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock (see *Sean O' Casey Patterson* and *Re TSY (an infant)*). In other words, rights of the parents/guardians have been extinguished by the making of an adoption order under the Adoption Act (Act 257).

[24] The present case deals with an adoption of an illegitimate child under the adoption Act 1952 (Act 257) and not under the Registration of Adoption Act (Act 253), as submitted. The defendant had not till to date adduced any independent verification that he is the biological father of the said illegitimate child except for his bare claims and averments. There is no express and/or direct evidence by any party including the biological mother of the said illegitimate child that the defendant is in fact the father. What the learned counsel of the defendant had proposed was the purported so-called admission by implication of the said mother (RML) in her affidavit that the defendant is the biological father. That said and notwithstanding, the law as it stands do not support the position and claim of the defendant. To reiterate what I had said earlier that a child who is born out of wedlock is related only to his/her mother and has no relationship with the biological father. In *Tang Kong Meng v Zainon bte Md Zain & Anor* [1995] 3 MLJ 408; [1995] 4 CLJ 409 James Foong J held that since the said child is an illegitimate child, the natural mother (who had the legal obligation to maintain the said child), had exclusive care and custody of the said child and could give valid consent to her adoption unless she had abandoned her rights beforehand. In *Re Miskin Rowter* it was held that when considering the interest of an illegitimate child, the court must have regard primarily to the welfare of the infant, the paramount consideration must be the welfare of the infant and the wishes of the natural mother. In *Re Carroll (an infant)* [1931] 1 KB 317 quoted with approval Fitzgibbon LJ in *Re O'Hara* [1900] 2 IR 232, that the mother of an illegitimate child has prima facie right of custody and the wishes of the mother are to be taken into account, but however the welfare and interest of the said child shall always be paramount. The putative father of the said illegitimate child, for so long as the said child remains illegitimate, is not generally recognised for civil purposes. He has no right to custody of the said child even though he may be in a better position to maintain the said child.

[25] In the present case I find as follows:

(a) the defendant has failed to mount any kind of legal challenge till to date on the court adoption order from the Shah Alam Sessions Court;

(b) there are probative materials at this juncture (unless successfully proven otherwise) of the defendant's defamatory campaign of fear and harassment against the plaintiffs;

(c) there are materials to consider whether the defendant had put the plaintiffs in fear of the child ('GHI') being abducted, public humiliation and contempt which in the normal circumstance can caused tremendous emotional distress on the parents of the said child;

(d) it is not denied that the defendant had unlawfully since 2016 used various social media platforms to publicly accused the plaintiffs amongst other things, of 'buying' the child, as being 'human traffickers', 'child abusers' and committing 'genocide' by adopting the child. There can be no doubt in my mind that there is a complaint in the form of the plaintiffs police report ((exh TTK-INJ-14) — (encl 5)), the offensive and threatening social media upload available in the defendant's account ((exh TTK-INJ-11) — (encl 5)) and the defendant's emails to the plaintiffs ((exh TTK-INJ-12) — (encl 5)), defendant's adverse chat with various people in his social media account ((exh TTK-INJ-13-21) — (encl 5)) TTK-INJ-13-21), police report lodged by the NGO, OrphanCare ((exh TTK-INJ-16) — (encl 5)), of which, all of the above constitute an integral part of the instant proceedings;

(e) the materials presented to the court by the plaintiffs in totality at this juncture clearly support the granting of the interim injunction to protect the said child from direct and/or indirect third party interference (putative father) who has no right to do so as dictated by law. The court must intervene if the harm to the child can be classified as a real and immediate danger to their physical well-being from anyone including their parents (see *Tan Chong Pay v Tan Swee Boon* [1997] MLJU 50; [1997] 4 CLJ 625;

(f) the tortious claims against the defendant are not to be determined at this juncture but only at the final determination of the trial (see *Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor* [2008] 4 MLJ 470; [2012] 1 LNS 896) In an application for interlocutory injunction, the court only needs to find bona fide serious issue to be tried and must refrain from making a determination of the issues (see *Tien Ik Sdn Bhd & Ors* and *American Cyanamid*); and

(g) it is my considered view after appraising all evidence and arguments placed before this court, that the defendant will not be prejudice by the granting of this interim injunction pending the final determination of this suit by the plaintiffs. I am in agreement with the plaintiffs' arguments that anchored on the prevailing materials presented, if this

A interim injunction is not granted there is a real and significant risk to the safety of the life of said child and his adoptive parents from third party interference by the putative father in total disregard to the court adoption order granted by a court of competent jurisdiction to the plaintiffs. The welfare and the best interest of the child is the paramount
B consideration in exercising this discretion. Damages would be an adequate remedy to compensate the defendant if it is determined later that the interim injunction had been wrongly granted, but the psychological trauma that will be visited on the said infant child if such restraint is not granted cannot be compensated by cost/damages.

C

[26] Consequently, I find that there are serious issues to be tried in the present case. The defendant had not been able to show any damage (real or otherwise) that will be suffered by him by the granting of this order. The restraint is only in respect of the said infant child and his adoptive parents. As
D far as the defendant is concerned, he is at full liberty to live his life as he has always done. It is my considered view that in the circumstances of the case has been in the plaintiffs' favour for the granting of the injunctive order as prayed, pending the determination of the plaintiffs claim against the defendant at the trial of this action.

E

CONCLUSION

[27] In light of the foregoing and after closely scrutinising the application and examining all evidence adduced before me, I allowed the plaintiffs'
F application ((encls 4 and 13 (amended), respectively) with no order as to cost.

Plaintiff's application allowed with no order as to cost.

Reported by Ahmad Ismail Illman Mohd Razali

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